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In The Supreme Court of the United States

October Term, 1996

Lexecon, Inc., *et al.*,
Petitioners,
v.
Milberg Weiss Bershad Hynes & Lerach,
A Partnership, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC., IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC., IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF *AMICI CURIAE*

Owens-Illinois, Inc.* ("Owens-Illinois") respectfully submits this brief as *amicus curiae* in support of respondents with the consent of the parties. The letters of consent from counsel for petitioners and respondents have been filed with the Clerk of the Court.

Owens-Illinois has a significant interest in this case because it is one of the defendants in the asbestos-related personal injury litigation. All of the pending federal asbestos-related personal injury cases, which number in the thousands, have been consolidated for pre-trial proce-

* Counsel for Owens-Illinois, Inc. authored this brief in whole.

dures as MDL 875 before Judge Charles Weiner of the Eastern District of Pennsylvania. That large and complex MDL is working extremely well. Judge Weiner has resolved—and continues to resolve—enormous numbers of these cases as part of his continuing supervision of the consolidated pre-trial procedures in MDL 875.

Owens-Illinois has been an active participant in all stages of the pre-trial procedures in MDL 875. Because of this experience, Owens-Illinois believes that its views on the proper scope of consolidated proceedings in a multidistrict action may be helpful to the Court.

SUMMARY OF ARGUMENT

Owens-Illinois believes the position articulated by respondents is correct, but will leave it to them to make the case for maintaining the long-accepted practice of allowing MDL transferee courts to retain jurisdiction pursuant to 28 U.S.C. §§ 1404 & 1407. Owens-Illinois respectfully submits that regardless of how this Court determines the question presented in this case, it should do nothing to jeopardize the transferee courts' ability to resolve cases in multidistrict consolidations such as MDL 875. Transferee courts should retain broad supervisory powers over all pretrial matters, which include discovery, dispositive motions, *and* settlement negotiations.

ARGUMENT

SUPERVISION OF SETTLEMENT NEGOTIATIONS IS A CRITICAL ASPECT OF "COORDINATED OR CONSOLIDATED PRETRIAL PROCEDURES" UNDER 28 U.S.C. § 1407.

As this Court considers the scope of 28 U.S.C. § 1407, it is crucial to recognize that "coordinated or consolidated pretrial procedures" include more than discovery and motions practice. Indeed, one of the most important benefits of multidistrict consolidation under § 1407 is the potential for resolution of claims without trial. Multi-

district litigation brings all of the parties and cases together under the umbrella of a single docket, creating enhanced opportunities for settlement discussions. It also allows the transferee court to establish sufficient familiarity with the issues for active supervision of settlement negotiations and review of dispositive motions. Although the question before the Court in this case does not directly involve those important functions, this Court should be cautious to avoid casting doubt on the authority of transferee courts to retain jurisdiction over cases in settlement negotiations and to oversee pretrial resolution of multidistrict claims.

The asbestos-related personal injury cases consolidated in MDL 875 illustrate the benefits of active court supervision of settlements in multidistrict litigation. Under Judge Weiner's direction, approximately 40,000 cases have been removed from the active federal asbestos docket during the pendency of MDL 875. *In re Asbestos Prods. Liab. Litig. (No. VI)*, No. MDL 875, 1996 WL 539589, *1 (E.D. Pa. Sept. 16, 1996). Approximately 65% of all pending federal asbestos cases have been resolved as active matters as to all parties. *Id.*

These cases were not resolved by class action settlements of the type rejected by this Court last term in *Amchem Prods., Inc. v. Windsor*, —— U.S. ——, 65 U.S.L.W. 4635 (1997). Rather, they were resolved through the active and often innovative efforts of Judge Weiner within the context of the pretrial proceedings.

For example, early in the pendency of MDL 875, Judge Weiner issued Administrative Order No. 3 (a copy of which is attached to this brief as Appendix A). That order provides a coordinated series of procedures for "review, settlement and/or further action in this cases." Though expressly warning that it was "not a substitute for broad-based negotiations designed to resolve entire blocks of cases," the court's mechanism is designed to give priority to claimants with the most serious injuries.

Administrative Order No. 3 requires voluntary production of detailed information about the most serious claims and expedited analysis by the defendants of those claims. The order also requires at least 30 days of good faith settlement negotiations, which are to be closely supervised by the court. (The order even details some of what each party must bring to the table in order to ensure that negotiations are actually conducted in good faith.) Appendix A at ——.

Judge Weiner also has instituted procedures which have led to block settlements. These have included plaintiff and defendant steering committees and a process by which test areas were sampled and data were examined by experts chosen by the parties. Thereafter, this process became a vehicle which is now in use in every jurisdiction across the country. *See In re Asbestos* at *1.

Furthermore, in suggesting cases for remand, Judge Weiner has deferred consideration of punitive damages. In entering orders suggesting remand, Judge Weiner notes that "the issue of punitive damages must be resolved at a further date with regard to the entire MDL action," and he therefore severs any claims for punitive or exemplary damages and retains those claims within MDL 875. (An example of such a ruling is attached to this brief as Appendix B.)

These rulings, among others, have made important contributions to the rapid and equitable resolution of federal asbestos cases. Judge Weiner has established procedures ensuring that the most serious cases go first and, by deferring punitive damages, he has helped to protect the ability of future plaintiffs to collect for their injuries. Moreover, Judge Weiner has established a detailed and effective structure for settlement discussions that has resolved large numbers of claims and helped clear asbestos dockets. As Judge Weiner has noted, his court's processing of MDL 875 "has resulted in the removal of 7-8,000 cases per year from the federal court dockets, while at the same time, these courts have been freed of the morass caused by the

mass of asbestos case filings and able to transact other important court business." *In re Asbestos* at *2. Indeed, "[f]or the first time, the case resolution numbers are exceeding new filings." *Id.*

These aspects of Judge Weiner's stewardship of MDL 875 may not directly involve discovery or motions, but they are no less important elements of "coordinated and consolidated pretrial proceedings" within the meaning of § 1407. Regardless of whether a case must return to its district of origin for the actual *trial*, settlement negotiations can—and often should—be conducted in the transferee court.

While the experience of MDL 875 makes clear the utility of such an interpretation, the plain language of § 1407, the legislative history of the statute, the rules of the JPML, and subsequent judicial and scholarly interpretation erase any doubt that the transferee district courts have the *authority* to oversee settlement negotiations and to dispose of cases prior to trial. First, this authority was explicitly provided by Congress. Section 1407 directs that the transferee court should remand the case "unless it shall have been previously terminated." As the Third Circuit has noted, this language "suggests that Congress contemplated that transferee courts would dismiss cases in response to dispositive motions." *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 367-68 (3d Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994).

Second, such authority was referenced in the legislative history. *See, e.g.*, H.R. Rep. No. 1130, 90th Cong., 2d Sess. 3, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900 (the transferee court would have the authority to "render summary judgment" and supervise all other "procedure[s] which precede the trial of an action"). Third, this authority is explicitly referenced in JPML Rule 14(a), which provides that "[A]ctions terminated in the transferee district court by valid judgment, including but not limited to summary judgment, judgment of dismissal and

judgment upon stipulation, shall not be remanded by the Panel and shall be dismissed by the transferee district court."

Fourth, the courts considering this issue have found that transferee courts have the authority to dispose of cases as part of their "coordinated pretrial procedures." *See, e.g., In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (transferee court has authority to enter dispositive orders terminating cases); *Trump*, 7 F.3d at 367 (same). Finally, commentators have noted that the transferee judge assigned to multidistrict litigation possess all pretrial powers over the transferred actions that the original district court could exercise, including the authority to decide motions for judgment approving a settlement, for dismissal, for judgment on the pleadings, for summary judgment. Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 578-83 (1978); Manual for Complex Litigation (Third) § 31.132 (1995) ("the transferee court may terminate actions by ruling on motions to dismiss or for summary judgment or pursuant to a settlement").

Thus, the law as it presently stands is clear—transferee judges have the authority to oversee broad-based settlement negotiations of the type presently being supervised by Judge Weiner in MDL 875. If this Court were to suggest that such supervision were not part of the "coordinated or consolidated pretrial procedures" contemplated in § 1407, it could bring the progress made by Judge Weiner and other transferee judges to a halt. In the case of MDL 875, it could relegate the disparate transferor courts to the fate of state court judges across the country, each of whom is destined to fight a decentralized, uncoordinated battle to bring order to its own asbestos docket.

CONCLUSION

This Court should affirm the judgment permit transferee courts to continue supervising settlement negotiations and resolving cases prior to trial pursuant to 28 U.S.C. § 1407.

Respectfully submitted,

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